1998

Robert B. Hansen v. Life-Line, a non-profit corporation : Reply Brief

Utah Court of Appeals

Robert Hansen; Attorney at Law.
Gregory J. Sanders; Kipp and Christian, P.C.; Attorneys for Appellee; Pro Se.

IN THE UTAH COURT OF APPEALS
OF THE STATE OF UTAH

ROBERT B. HANSEN	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 981783-CA
	:	Priority No. 15
LIFE LINE, a non-profit corporation,	:	
Defendant and Appellee.	:	

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Judith S.H. Atherton
for Ann Boyden, Retired

Gregory J. Sanders
KIPP & CHRISTIAN, P.C.
10 Exchange Place, 4th Floor
Salt Lake City, UT 84111

Attorneys for Appellee

Robert B. Hansen, #1344
Attorney at Law
838 18th Avenue
Salt Lake City, UT 84103

Attorney Pro Se for Appellant

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Attorney at Law
838 18th Avenue
Salt Lake City, UT 84103

Attorney Pro Se for Appellant

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STATEMENT OF ISSUES

In the third paragraph of this section of Appellee's Brief, it is asserted that the issue substantively is "whether the court ruled correctly as a matter of law that Mr. Hansen was not an at will employee". Appellant respectfully submits that the lower court undertook to rule on that issue as a matter of fact and that this was error, as it was a question of fact for the jury to decide, hence this appeal.

DETERMINATIVE LAW

Appellant cited on page 6 of his brief that the determinative law was Rule 56, U. C. R. P. , hence Appellees assertion the Appellee (sic) identifies no controlling rules, regulations, statutes or constitutional provisions is not so. (See Page 1 of Appellee's Brief)

STATEMENT OF CASE

A. Substantially correct.

B. Correct.

DISPOSITION IN TRIAL COURT

Correct

SUMMARY OF ARGUMENTS

Under this heading, Appellant's Brief on Page 8 argues that Plaintiff was never an "at will" employee because of an express oral contract entered into in 1990, which set forth the length of his employment (during physical and mental abilities).

ARGUMENT

On this subject, Appellee argues (See Page 2 of Appellee's Brief) as follows: "(Appellant's) argument beginning on page 9 is to state the conclusion that summary judgement was not appropriate, and then to recite at length quotations from a variety of cases stating the standard of review for summary judgement". In the next paragraph of Appellee's Brief it refers to page 14 of Appellant's Brief wherein Appellant argues that Plaintiff is entitled to a jury trial on the issue of whether or not he was an "at will employee". Thus, it is clear that the brief in question

not only supplied the argument on which it was based, but set forth the authorities in support thereof, hence there has been no "dumping" here, such as was described in the case Crossroads Plaza Association v. Pratt, 912 P 2nd, 961 (Utah 1996) (the term "dump" comes from Appellee's brief, not from the Court opinion (See Addendum No. 1).

The next case dealt with in Appellee's Brief is Astil v. Clark, 956 P 2nd, 081 (Utah App. 1998). There, the Court would not consider application of a California jury instruction to that case where "no analysis or legal authority" was presented to the Appellate Court (P. 1089). Said case is clearly distinguishable from the instant one as no jury instruction "in case of remand" is sought here, and none are presented here, as was the case there.

As for Butler, 909 P 2nd, 225, the next case cited by Appellee, requires a marshalling of evidence by the Appellant in challenging the accuracy and sufficiency of evidence underlying the trial court's findings of fact. Here, the trial court made no findings of fact, but only a conclusion of law, to wit: that Appellant was an "at will employee". It is clear that Appellee so understood the subject brief because in **bold print** on page 5 it states "B. Mr. Hansen was an At Will Employee as a Matter of Law". The last sentence of the fourth paragraph of Appellee's Brief (Page 6), thereunder states "In the language of Rule 56, the claims failed for a lack of any genuine issue of material fact as to whether an "at will" relationship existed". The "claims failed" must refer to Appellant's claim that he was entitled to a trial on **any** material fact in dispute, and Appellee claims that there was none. However, that "begs the question", because the issue is whether or not there is a material fact in dispute, and not whether there must be a trial if such a factual dispute exists.

As for cases: **A.** Ryan v. Dan's Food Stores Inc. 972 P 2nd 395 (Utah 1998), **B.** Fox v. MCI Communications Corp. 931 P 2nd 857 (Utah 1997), and **C.** Sorensen v. Kennecott Utah Copper Corp. 873 P 2nd 1311 (Utah 1991), (See Table of Authorities in Appellee's Brief), Appellant acknowledges (as those cases so held) that it is **his** burden to prove that an "at will" contract did **not** exist, but contends he is entitled to prove such at trial, and that the existence of such a relationship can **not** be decided as a matter of law in the face of his affidavit that there was an express oral contract entered into in 1990 that would endure as long as he was healthy enough to fullfill his duties under that contract.

CONCLUSION

There are **questions of fact** as to whether the Appellant was an "at will" employee and whether Appellee was entitled to Summary Judgement as a mater of law. Thus, Summary Judgement was not proper. It should be over-ruled and the case remanded to the trial court for **trial** and disposition.

Dated this ____day of May, 1999.

Robert B. Hansen, Pro Se
Appellant

ADDENDUM

1. Copy of opinion in the case of Crossroads Plaza Association v. Pratt, 912 P 2nd, 961 (Utah 1996).

2. Summary of Arguments and Detail of Arguments, Pages 8 - 14 of Appellant's Brief.

MAILING CERTIFICATE

I certify that two (2) copies of the foregoing **APPELLANT'S REPLY BRIEF** was sent to the following parties by placing true and correct copies thereof in an envelope addressed to the parties listed below:

Gregory J. Sanders
KIPP & CHRISTIAN, P.C.
Attorneys at Law
10 Exchange Place, 4th Floor
Salt Lake City, UT 84111

and mailing the same, sealed, with first class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah on this the _____ day of May, 1999.

Robert B. Hansen, Pro Se

aseback. Applying Utah Code Ann. §§ 59–102 to –103, the Court of Appeals affirmed the Commission's declaratory order that the proposed transaction would be subject to Utah sales tax. *Matrix Funding Corp. v. Utah State Tax Comm'n*, 868 P.2d 832, 833–34 (Utah Ct.App.1994). We granted certiorari to review that decision. However, because of an amendment to the tax code in 1995 dealing specifically with the taxability of sale-leaseback transactions, we hold that this case is moot.

[1, 2] As a matter of sound jurisprudential policy, courts refrain from adjudicating legal issues when the underlying case is moot. "A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants." *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989); *see also Jones v. Schwendiman*, 721 P.2d 893, 894 (Utah 1986); *Black v. Alpha Fin. Corp.*, 656 P.2d 409, 410–11 (Utah 1982); *49th Street Galleria v. Tax Comm'n*, 860 P.2d 996, 998 n. 4 (Utah Ct.App.1993).

Matrix requested a declaratory order from the Tax Commission based on a proposed plan to enter into a sale-leaseback arrangement with an unspecified customer. The stated purpose of the arrangement was to provide security for a loan from Matrix. In proceedings before the Commission and before the Court of Appeals, the parties stipulated that the issue related to a purely prospective arrangement. That status was reiterated in the briefs and at oral argument before this Court.

The hypothetical posture of a case does not, by itself, prevent us from reviewing administrative declaratory order. Pursuant to the Utah Administrative Procedures Act, "[a] declaratory order has the same force and binding effect as any other order issued in an adjudicative proceeding." Utah Code Ann. § 63–46b–21(6)(d). For example, in *49th Street Galleria*, 860 P.2d at 998 n. 4, the Court of Appeals reviewed a ruling of the Tax Commission even though no tax was assessed because the question of whether tax liability would be incurred for similar activities in the future constituted a genuine controversy subject to adjudication.

[4] However, effective July 1, 1995, the Legislature amended provisions of the tax code to specifically address the issue of whether sale-leaseback transactions were subject to the sales tax. *See* Utah Code Ann. § 59–12–102(13)(c) (Supp.1995). This provision applies to the type of sale-leaseback transaction at issue in this case. Neither the Tax Commission, nor the Court of Appeals in reviewing the decision of the Tax Commission, addressed the issue in light of the 1995 amendment because it had not yet been enacted. A decision by this Court addressing the hypothetical transaction presented to the Commission on the basis of the pre–1995 law could not decide the taxability of a future sale-leaseback transaction between Matrix and its customers. Thus, a decision by this Court could not affect any legal rights or duties of the parties and in a literal sense would be a meaningless judicial act. For that reason, we hold that the case is moot. *See Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989).

ZIMMERMAN, C.J., HOWE and DURHAM, JJ., and BEN H. HADFIELD, District Judge, concur.

RUSSON, J., having disqualified himself, does not participate herein; BEN H. HADFIELD, District Judge, sat.

CROSSROADS PLAZA ASSOCIATION, a Utah corporation, Plaintiff, Appellee, and Cross–Appellant,

v.

Gary PRATT, in his official capacity only, and Salt Lake County, Defendants, Appellants, and Cross–Appellees.

No. 940454.

Supreme Court of Utah.

Feb. 22, 1996.

Corporate taxpayer sought declaratory and injunctive relief from real property taxes

imposed by county on leasehold improvements made to taxpayer's real property by lease of that property. The District Court, Salt Lake County, Kenneth Rigtrup, J., granted taxpayer summary judgment, and county appealed. The Supreme Court, Russon, J., held that: (1) rule that leasehold improvements under control of lessee shall be taxed as personal property of lessee made owners of underlying real property ultimately responsible for taxes on such improvements; (2) "leasehold improvements" were real property for real property tax purposes; and (3) property was "improvement" to real property if it was erected upon or affixed to land.

Reversed and remanded.

1. Appeal and Error ⇐842(1)

Because challenge to summary judgment presents for review only questions of law, reviewing court accords no deference to trial court's conclusions but reviews them for correctness.

2. Administrative Law and Procedure ⇐390.1

It is longstanding principle of administrative law that agency's rules must be consistent with its governing statutes.

3. Administrative Law and Procedure ⇐390.1

Administrative rule out of harmony or in conflict with express provisions of statute would in effect amend that statute.

4. Taxation ⇐65

Tax commission rule that leasehold improvements under control of lessee shall be taxed as personal property of lessee did not transform improvements into personal property, such that they could only be taxed to lessee, but rather, consistent with enabling statutes, made improvements taxable in way or manner in which personal property was taxed, and therefore owners of underlying real property were ultimately liable for taxes due on such improvements. U.C.A.1953, 59–2–303, 59–2–1325; Utah Admin. Code R884–24P–32(B).

5. Administrative Law and Procedure ⇐412.1

Rules made in exercise of power delegated by statute should be construed together with statute to make, if possible, effectual piece of legislation in harmony with common sense and sound reason.

6. Statutes ⇐188

In interpreting statutes, courts look to plain meaning of language at issue to discern legislative intent.

7. Administrative Law and Procedure ⇐390.1

Agency rule cannot trump statutory provision.

8. Taxation ⇐65

"Leasehold improvements" were real property for real property tax purposes, so as to make applicable statute which provided that tax due upon improvements upon real property assessed to person other than owner of real property was lien upon property and improvements. U.C.A.1953, 59–2–1325; U.C.A.1953, 59–2–102(11) (1994).

9. Taxation ⇐65

Test of whether property is "improvement" to real property for real property tax purposes is whether it is erected upon or affixed to the land, rather than test used in mechanic's lien cases. U.C.A.1953, 59–2–102(11) (1994).

See publication Words and Phrases for other judicial constructions and definitions.

10. Taxation ⇐65

If real property underlying improvement is building or other improvement, this satisfies statutory requirement that property constituting improvement be affixed "to the land" for purposes of real property taxation. U.C.A.1953, 59–2–102(11) (1994).

11. Appeal and Error ⇐756

Reviewing court is entitled to have issues clearly defined with pertinent authority cited and is not simply depository in which party may dump burden of argument and research.

12. Taxation ⇐493.5

Taxpayer's failure to present any evidence that county failed to give timely notice of property tax on leasehold improvements rendered issue inappropriate for review.

Appeal from the Third District, Salt Lake County; Kenneth Rigtrup, Judge.

Robert B. Lochhead, David F. Crabtree, Salt Lake City, for plaintiff.

Douglas R. Short, Mary Ellen Sloan, Salt Lake City, for defendants.

RUSSON, Justice:

Crossroads Plaza Association (Crossroads) filed an action against Gary Pratt, the Salt Lake County Treasurer, and Salt Lake County, seeking a declaratory judgment and injunctive relief regarding taxes imposed by Salt Lake County on leasehold improvements to Crossroads' real property. The trial court granted summary judgment in favor of Crossroads. Salt Lake County appeals. We reverse and remand.

FACTS

In 1987, Chappell, Inc., a Utah corporation dba Bennetton, leased space in the Crossroads Plaza Mall to establish a retail clothing store. Bennetton made changes to the property including the installation of various walls, a ceiling, a glass storefront, carpet, and granite flooring. In June 1988, the Salt Lake County Assessor's office conducted an audit of Bennetton's property, categorizing it as trade fixtures, computer equipment, and leasehold improvements. Subsequently, the Salt Lake County Assessor submitted to Bennetton a document setting forth the leasehold improvements, including the walls, storefront, flooring and ceiling, and instructing Bennetton to indicate the year in which they were installed and the cost of installing the improvements. On the basis of Bennetton's answers, the assessor determined the taxable value of the leasehold improvements.

Each year from 1988 to 1990, Bennetton filed a personal property affidavit [1] identifying not only its personal property, but also its leasehold improvements, and paid taxes on both to Salt Lake County (the County). The County collected taxes on the leasehold improvements from Bennetton through its personal property tax collection system pursuant to an administrative rule of the tax commission which provides, "A. Leasehold improvements under the control of the lessee shall be taxed as personal property of the lessee." Utah Admin.Code R884–24P–32.

In 1991, Bennetton failed to file its personal property affidavit. The County notified Bennetton of the delinquency and assessed taxes against Bennetton based on the previously submitted affidavits. When Bennetton failed to pay any of its 1991 property tax, the assessor held a sale of Bennetton's personal property to recover the taxes due on the personal property pursuant to section 59–2–1310(1) of the Utah Code, which provides, "The [county] treasurer shall collect the taxes delinquent on personal property ... by seizure and sale of any personal property owned by the delinquent taxpayer." The record indicates that the County did not intend to sell any of Bennetton's leasehold improvement property. After the sale of the personal property, the county assessor served notice of the amount of tax due on the leasehold improvements to Crossroads, the owner of the underlying realty. Crossroads filed a written objection with the County, arguing that the tax notice was an impermissible double taxation and objecting to the County's purported authority for assessing the disputed tax to Crossroads. Without responding to Crossroads' objection, the County subsequently included the disputed tax on the leasehold improvements in Crossroads' 1992 real property tax notice and placed a lien on Crossroads' real property for the tax due pursuant to section 59–2–1325 of the Utah Code, which states:

> A tax upon real property is a lien against the property assessed. *A tax due upon*

1. The affidavit is authorized by section 59–2–306(1) of the Utah Code, which provides in relevant part, "The county assessor may request a signed statement in affidavit form from any person setting forth all the real and personal property assessable by the assessor which is owned, possessed, managed, or under the control of the person ..."

improvements upon real property assessed to a person other than the owner of the real property is a lien upon the property and improvements. These liens attach as of January 1 of each year.

(Emphasis added.)

In 1992, Crossroads paid the disputed tax under protest and subsequently filed suit against the County, claiming that (1) the County's demanding payment of the taxes due on Bennetton's leasehold improvements was a double assessment of property in violation of Utah law; (2) the collection of the disputed tax from a party unrelated to Bennetton, to whom the tax was originally assessed, was a violation of Utah law; and (3) the levy, assessment, and collection of the disputed tax from Crossroads or as part of Crossroads' real property tax assessment was a violation of Utah law. The County responded, claiming that Crossroads, as the owner of the underlying property, is responsible for the taxes due on the leasehold improvements of its tenants pursuant to section 59–2–1325 of the Utah Code. Both parties moved for summary judgment.

In its motion, Crossroads primarily argued that because the leasehold improvements had been taxed as personal property under tax commission rule 884–24P–32, Crossroads was not liable for the tax. During the summary judgment hearing, Crossroads stated: "And so we have the issue well before us. The argument that decides the entire case is based entirely on statutory language and on the rule promulgated by the Tax Commission." The court granted summary judgment in favor of Crossroads, concluding that because the leasehold improvements were in the control of the lessee, rule 884–24P–32, which provides that leasehold improvements be taxed as personal property, applied. The court concluded that section 59–2–1325 did not apply. On appeal, the County argues that the court erred in finding (1) that rule 884–24P–32 was the governing law, and (2) that leasehold improvements are personal property and therefore taxable only to the leaseholder, not to the owner of the underlying realty.

STANDARD OF REVIEW

[1] Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 256 (Utah 1994). "Because a challenge to summary judgment presents for review only questions of law, we accord no deference to the trial court's conclusions but review them for correctness." *Id.; see Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1111–12 (Utah 1991).

ANALYSIS

We begin by addressing the apparent discrepancy between tax commission rule 884–24P–32 and section 59–2–1325 of the Utah Code. As did the trial court, we assume for the sake of this part of the analysis that the property in question was "leasehold improvements." Crossroads argues that under rule 884–24P–32, "leasehold improvements" are specifically taxed as *personal property* which are in the control of Bennetton and for which Crossroads is not responsible. That rule states:

A. Leasehold improvements under the control of the lessee *shall be taxed as personal property of the lessee.*

B. If not taxed as personal property of the lessee, the value of leasehold improvements shall be included in the value of the real property.

(Emphasis added.)

On the other hand, the County argues that rule 884–24P–32 only *describes the method* by which "leasehold improvements" should be taxed, without establishing that "leasehold improvements" are personal property and that the tax on leasehold improvements is actually controlled by section 59–2–1325 of the Utah Code, which states:

A tax upon real property is a lien against the property assessed. A tax due upon *improvements upon real property* assessed to a person other than the owner of the real property *is a lien upon the property*

and improvements. These liens attach as of January 1 of each year.

(Emphasis added.)

The trial court held that rule 884–24P–32 applied in this case and that section 59–2–1325 did not apply. The trial court concluded: "In light of the Court's finding that the leasehold improvements were in the control of the lessee, [rule 884–24P–32] ... applies in this case.... Section 59–2–1325 of the Utah Code is not a fall-back to the Rule promulgated by the Tax Commission...." The trial court determined that these provisions could not be harmonized and chose to apply the rule over the statute.

[2, 3] "It is a longstanding principle of administrative law that an agency's rules must be consistent with its governing statutes." *Sanders Brine Shrimp v. Audit Div.*, 846 P.2d 1304, 1306 (Utah 1993). Further, "[a]n administrative rule out of harmony or in conflict with the express provisions of a statute 'would in effect amend that statute.'" *Consolidation Coal Co. v. Utah Div. of State Lands & Forestry,* 886 P.2d 514, 532 (Utah 1994) (Bench, J., concurring and dissenting) (quoting *Olson Constr. Co. v. State Tax Comm'n,* 12 Utah 2d 42, 45, 361 P.2d 1112, 1113 (1961)). With these principles in mind, we begin our analysis of these provisions.

[4–6] We first address the County's argument that rule 884–24P–32 can be read consistently with the tax code and that the trial court erred in finding rule 884–24P–32 to be the only governing law. "'Rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.'" *Id.* at 527 n. 22 (quoting *McKnight v. State Land Bd.*, 14 Utah 2d 238, 245, 381 P.2d 726, 731 (1963)). Tax commission rule 884–24P–32 was promulgated pursuant to section 59–2–303 of the Utah Code, which sets out the general duties of the county assessor. This section states:

> Prior to May 22 of each year, the county assessor shall ascertain the names of the owners of all property which is subject to taxation by the county, and shall assess the property to the owner, claimant of record, or occupant in possession or *control* [of the property].

(Emphasis added.) "In interpreting this statute, we look to the plain meaning of the language at issue to discern the legislative intent." *Chris & Dick's Lumber & Hardware v. Tax Comm'n,* 791 P.2d 511, 514 (Utah 1990). This section specifically allows the assessor to assess property to one in control of the property. Rule 884–24P–32, which provides that leasehold improvements *under the control of the lessee* be taxed as personal property of the lessee is consistent with this statute. *See also Valley Fair Fashions, Inc. v. Valley Fair,* 54 Cal.Rptr. 306, 307, 245 Cal.App.2d 614 (Dist.Ct.App.1966) (holding that statute similar to section 59–2–303 authorized assessment of improvements to the tenant in control of the improvements).

The very statute Crossroads seeks to avoid provides, "A tax due upon improvements upon real property *assessed to a person other than the owner of the real property* is a lien upon the property and improvements." Utah Code Ann. § 59–2–1325 (emphasis added). It is obvious from the plain language of this section that the legislature contemplated that a tax on improvements might be assessed to someone other than the owner of the underlying property.

Read consistently with the governing statutes, rule 884–24P–32 does not transform improvements into personal property, but rather in light of sections 59–2–303 and 59–2–1325, the rule provides a means of assessing such improvements "to a person other than the owner of the real property." Thus, leasehold improvements taxed "*as*" personal property means that such improvements will be taxed "*in the way or manner*" in which personal property is taxed. *Webster's Ninth New Collegiate Dictionary* 106 (1984) (emphasis added). Moreover, the second part of the rule at issue provides, "(B) If not taxed as personal property of the lessee, the *value of leasehold improvements shall be included in the value of the real property.*" Utah Admin.Code R884–24P–32(B) (emphasis added). Because this part of the rule refers to leasehold improvements in the context of *real property* valuation, it further indicates that the first part of the rule at issue here merely

provides for leasehold improvements to be taxed in the way in which personal property is taxed and can be read consistently with section 1325.[2]

[7] Tax commission rule 884–24P–32 does not contravene the requirement of section 59–2–1325 of the Utah Code that "a tax due upon improvements upon real property . . . is a lien upon the property." To the extent the trial court found that rule 884–24P–32 controlled the dispute, it erred. An "agency rule cannot 'trump' a [statutory provision]." *Consolidation Coal Co.*, 886 P.2d at 532 (Bench, J., concurring and dissenting). Other jurisdictions have also held that a tax due on improvements to real property is a lien on that property regardless of whether the local assessor may assess the tax to the lessee in control of the improvements. For example, in *Koester v. Hunterdon County Board of Taxation*, 79 N.J. 381, 399 A.2d 656 (1979), the court stated: "In *Becker* the local assessor had for years assessed the value of the building to its owner and the value of the leased land on which it stood to its owner. The Court of Errors and Appeals held that notwithstanding this practice, the landowner remained liable for the tax on the entire parcel including the building...." *Id.* at 662 (citing *Becker v. Mayor of Little Ferry*, 19 A.2d 657, 659 (N.J.1941)). The court in *Koester* went on to hold that separately taxed mobile homes on leased property remained taxable as real property. *Id.* at 663.

[8] To determine whether section 59–2–1325 applies to Bennetton's leasehold improvements, we must determine whether "leasehold improvements" are improvements to real property for tax purposes. Although the tax code does not define "leasehold improvements," it does define "improvements," which are included in the code's definition of "real estate or property."[3] Utah Code Ann. § 59–2–102(20). "Improvements" include "all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land, *whether the title has been acquired to the land or not.*" Utah Code Ann. § 59–2–102(11) (1992) (emphasis added). It is clear from this wording that the legislature contemplated that improvements might be made to property in which types of interest other than title may be held. We must assume that since the legislature did not specifically exclude "leased property" from those nontitle lands, improvements to leased property are included in this definition. *Accord Interwest Aviation v. County Bd. of Equalization*, 743 P.2d 1222, 1224 (Utah 1987) (implicitly holding that structures in question were "improvements" even though affixed to leased real property); *Great Salt Lake Minerals & Chems. Corp. v. State Tax Comm'n*, 573 P.2d 337, 340 (Utah 1977) (same); *see also* Utah State Tax Commission, Property Tax Division, *Personal Property Tax Standards* 2 (1992) (defining "leasehold improvements" to mean "*improvements* or additions to leased real property that have been made by the lessee (tenant)" (emphasis added)).

Because "leasehold improvements" are "improvements" and "improvements" are real property, "leasehold improvements" are real property for tax purposes. Thus, we conclude that section 59–2–1325 applies to leasehold improvements. "A contrary conclusion strains the express language contained [in the statute] and thwarts the imposition of taxes." *Great Salt Lake Minerals & Chems. Corp.*, 573 P.2d at 340. Under Utah law, when a tax on leasehold improvements is due, section 59–2–1325 of the tax code specifies that a lien is placed on the underlying real property. We therefore reverse the trial court's conclusion that section 59–2–1325 does not apply to Bennetton's leasehold improvements.

[9] However, because the trial court assumed that the property in question was "leasehold improvements" and then errone-

2. Crossroads argues that this court does not have jurisdiction to invalidate the tax commission rule because to maintain a judicial challenge to an administrative rule, an aggrieved person must exhaust all administrative remedies under the Utah Administrative Rulemaking Act, which, Crossroads argues, the County has not done. Inasmuch as we find the administrative rule on leasehold improvements to be consistent with the Tax Code, we do not address this issue.

3. We construe this definition as applying to "real estate" or "real property."

ously concluded that rule 884–24P–32 establishes that "leasehold improvements" are personal property, it did not reach the parties' arguments as to whether the property in question would otherwise qualify as "improvements" to real property. Thus, we now address the parties' legal arguments as to what constitutes an "improvement" to real property to guide the trial court's disposition of this issue on remand.

As it did in its motion below, the County argues on appeal that the property in question was "improvements to real property" by virtue of its being affixed to the underlying property. The County argues that under Utah law, "affixation" is the sole test of whether a structure is an improvement to real property for tax purposes. Crossroads argues, however, that the property in question was not "improvements" because it was not permanently affixed and it did not materially enhance the value of Crossroads' property.

Crossroads argues that to be "improvements to real property," structures must meet the test set forth in a mechanic's lien case, *Paul Mueller Co. v. Cache Valley Dairy Ass'n*, 657 P.2d 1279 (Utah 1982). *Mueller* involved a former Utah statute under which unpaid contractors could enforce a mechanic's lien upon the real property which was improved by their work. Utah Code Ann. §§ 38–1–3, 38–1–4 (1953). The statute applied only to buildings, structures, or improvements to property and did not include the installation of equipment or personal property. *Id.* To distinguish between real and personal property, the court used a three-part test, considering

> "(1) [the] manner in which the item is attached or annexed to realty; (2) whether the item is adaptable to the particular use of the realty; and (3) the intention of the annexor to make an item a permanent part of the realty."

Paul Mueller Co., 657 P.2d at 1283 (alteration in original) (quoting *State v. Papanikolas*, 19 Utah 2d 153, 155, 427 P.2d 749, 751 (1967)). *Mueller* affirmed the trial court's finding that under the three-part test, the equipment in question was personal property, not improvements to real property. *Id.* at 1283–85. While this court may have endorsed this test for purposes of a mechanic's lien, more recently, in *Morton International, Inc. v. Auditing Division of Utah State Tax Commission*, 814 P.2d 581, 594 (Utah 1991), we rejected this type of functional analysis to determine whether property is real property for taxation purposes. We noted that "the case law from other jurisdictions is at best conflicting in this area. There are jurisdictions that have not followed a functional approach in interpreting similar statutes. Furthermore, the jurisdictions that have adopted a functional approach have reached conflicting conclusions." *Id.* (footnotes omitted). In *Morton International*, this court upheld as reasonable a tax commission determination that flooring, walls, and ceiling were real property for tax purposes, not equipment exempt from sales and use taxes. We reasoned that given the inconsistencies between the controlling statute and governing rule and the conflicting case law, the Commission's determination was not to be disturbed. *Id.*

As in *Morton International*, we decline to adopt the test urged by Crossroads. We find guidance instead in our past interpretations of the tax code. "Improvements" include "all buildings, structures, fixtures, fences and improvements *erected upon or affixed to the land*, whether the title has been acquired to the land or not." Utah Code Ann. § 59–2–102(11) (1992) (emphasis added). In *Nickerson Pump & Machinery Co. v. State Tax Commission*, 12 Utah 2d 30, 33, 361 P.2d 520, 521–22 (1961), construing a former sales and use tax statute, we held that water pumps, although installed, did not become real property for tax purposes. We reasoned that the placement was "incidental" to the purpose of the water pumps and a "mere convenience for the purchaser because of the great weight of the pumps," and we compared the pumps to "a massive desk or refrigerator built to specifications." *Id.* More recently, however, in *Chicago Bridge & Iron Co. v. State Tax Commission*, 839 P.2d 303 (Utah 1992), we recognized there may be factual disputes as to the distinction between tangible personal property and real property and found reasonable a tax commission rul-

ing that certain items were real property "*once attached*" to the property. *Id.* at 307 (emphasis added). Similarly, in another tax case, we reiterated that a Utah sales tax statute identical to the property tax statute at issue in this case defines "improvements" as "all buildings, structures, fixtures, fences and improvements *erected upon or affixed to land*...." *Great Salt Lake Minerals & Chems. Corp.*, 573 P.2d at 339 (citing Utah Code Ann. § 59–3–1(3) (emphasis added); *see also Valgardson Hous. Sys. v. State Tax Comm'n*, 849 P.2d 618, 622 (Utah Ct.App.), *cert. denied*, 859 P.2d 585 (Utah 1993) ("Language in Utah tax cases supports the ... 'affixation' distinction between tangible personal property and improvement to real estate."). In light of the plain language of the statute and our recent decisions regarding "improvements," we now hold that the test of whether property is an "improvement" to real property for tax purposes is whether it is "erected upon or affixed to the land." Utah Code Ann. § 59–2–102(11) (1992).

[10] Further, we recognize that while "land" is not defined in the tax code, the common meaning of the word frequently includes both land and the structures built upon it. *See* Utah Code Ann. § 13–8–2(1)(e) (defining "land" for purposes of certain construction agreements to mean "any real property, including any building, fixture, improvement"); *Jeffery v. City of Salinas*, 232 Cal.App.2d 29, 42 Cal.Rptr. 486, 498–99 (1965) ("land" includes land and improvements). Thus, as in this case, if the underlying property is a building or other "improvement," this satisfies the statutory requirement that the property be affixed "to the land."

Crossroads asserts that the property in question was not "permanently" attached and that in any event it did not add value to the Crossroads property. However, the statute merely requires that the structure be "erected upon or affixed to the land" and requires neither permanency nor that the improvement materially enhance the value of the underlying property. We have previously held that simply adding value to property does not make a change to real property an improvement. *See Backus v. Hooten*, 4 Utah 2d 364, 367, 294 P.2d 703, 705 (1956). Likewise, an improvement does not fail to qualify as an improvement under the statute merely because it fails to add value to the property. With respect to Crossroads' "permanency" argument, we note that even jurisdictions which, by statute, require that improvements be "permanently affixed" do not equate permanence with perpetuity. *See Michigan Nat'l Bank v. City of Lansing*, 96 Mich.App. 551, 293 N.W.2d 626, 627 (1980) ("It is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose."), *aff'd*, 322 N.W.2d 173 (Mich.1982); *San Diego Trust & Sav. Bank v. San Diego County*, 16 Cal.2d 142, 105 P.2d 94, 98 (1940), *cert. denied*, 312 U.S. 679, 61 S.Ct. 449, 85 L.Ed. 1118 (1941) (same).

Whether property constitutes "improvements" to real property for tax purposes depends on whether such property is "erected upon or affixed to" the underlying property. Utah Code Ann. § 59–2–102(11) (1992). In this case, because the trial court found that the property in question was personal property as a matter of law, it did not reach the question of whether the property in question was in fact "improvements" to real property. On remand, we direct the trial court to determine whether the property in question constitutes "improvements" under the "affixation" test we have enunciated.

CONCLUSION

[11, 12] Under Utah law, leasehold improvements are improvements to real property for tax purposes. While taxes on leasehold improvements may be assessed and collected from the lessee in control of such improvements, owners of the underlying real property are ultimately responsible for taxes due on such improvements under

section 59–2–1325 of the Utah Code.[4] In the instant case, Crossroads, as the owner of the property underlying Bennetton's leasehold improvements, is responsible for unpaid taxes on such improvements.[5] The trial court's legal conclusion that the taxes on leasehold improvements under Bennetton's control are collectable only from Bennetton is in error, and therefore, we reverse the trial court's grant of summary judgment in favor of Crossroads and remand to the trial court for further proceedings consistent with this opinion.[6]

ZIMMERMAN, C.J., STEWART, Associate C.J., HOWE and DAVIS, JJ., concur.

DURHAM, J., having disqualified herself, does not participate herein; LYNN W. DAVIS, District Judge, sat.

4. We recognize that this rule as applied to mall owners may seem somewhat harsh given their particular circumstances with respect to leasehold improvements on their property. However, a change in the statutory provision underlying our decision today is a question properly within the province of the legislature.

5. We do not address whether the County's action in this case amounts to a double assessment of taxes. Although Crossroads raises this issue, its briefing is inadequate. "[A] 'reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the ... party may dump the burden of argument and research.'" *Butler, Crockett & Walsh Dev. Co. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225 (1995) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)). For the same reason, we do not address whether due process problems exist in Crossroads' case.

We likewise do not address whether the County's failure to give timely notice of the tax on the leasehold improvements invalidates any lien that would otherwise arise on Crossroads' property. We find no evidence in the record that Crossroads raised this issue before the trial court, and we will not consider it on appeal. *Kennecott Corp. v. State Tax Comm'n*, 862 P.2d 1348, 1352 (Utah 1993); *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993).

6. Because we reverse and remand, we do not reach Crossroads' cross-appeals regarding the calculation of interest and fees.

In re **Estate of Christine Cannon KNICKERBOCKER, Decedent.**

Bradford E. KNICKERBOCKER, Plaintiff and Appellant,

v.

James Q. CANNON, Defendant and Appellee.

Anthony J. CANNON, Elaine A. Cannon, and James Q. Cannon, as Trustees of the Christine C. Knickerbocker Trust, and Anthony J. Cannon, as Special Administrator of the Estate of Christine C. Cannon Knickerbocker, Cross–Appellants,

v.

Bradford E. KNICKERBOCKER, Cross–Appellee.

Nos. 940206, 940222.

Supreme Court of Utah.

Feb. 23, 1996.

Petition for formal probate of will was filed following death of spouse while divorce proceedings were pending, and surviving spouse filed actions challenging validity of change of life insurance beneficiary, severance of joint tenancy ownership of marital residence, and creation of revokable trust agreement. The Third District Court, Salt Lake County, Leslie A. Lewis, J., granted survivor's motion for partial summary judgment, finding that removal of household furnishing was conversion, but, following trial,

On the second issue for review, to wit "whether Life Line is entitled to judgment as a matter of law" the record does not show that it is. In fact, Life Line's Memorandum shows (Record 42, Par. 9) that during 1997 Appellant was on sick leave, and Appellant's verified complaint (Record 05, Par. 3) shows an express oral contract for an indefinite period of time but terminable if Appellant's health rendered him unable to fulfill his contract. In short, even if the subject employment was "at will" the employment contract continued until terminated and there is no evidence in the record that it was ever terminated.

In nearly every summary judgment opinion where such a motion was granted there is a coupling of a determination of no factual issues with a finding that the moving party was entitled to judgment as a matter of law. As noted above, no such coupling exists here for reasons stated above.

8. **SUMMARY OF ARGUMENTS**

Appellant respectfully argues that he was never an "at will" employee as the duration of his employment contract was expressly dependent upon his health and he was never terminated due to physical or mental inability to perform the work he contracted to do. Appellee contends otherwise and this creates the questions of fact which preclude summary judgment.

9. **DETAIL OF ARGUMENTS**

There was no written agreement which could have conclusively settled the "at will" question, but the oral agreement of the

parties set forth its duration (until Appellant was unable to carry out his duties) and thus the employer was not able "at will" to end the employment contract before its termination date and to do so for any reasons of its choosing.

This factual dispute precluded summary judgment against appellant.

The Utah case most often cited on the issue of summary judgment is Holbrook Company v. Adams, 542 P.2d 191 (Utah 1975). Some of its progeny and their quotes which Appellant believes are applicable to this case are the following:

ARGUMENT I

SUMMARY JUDGMENT WAS NOT PROPER IN THIS CASE

It is the position of the Appellant that the pleading was of such complexity that the litigation before the trial court was never in a posture where summary judgment was a pro-remedy.

THE LAW

Summary judgment is provided by Rule 56 of the Rules of Civil Procedure. Rule 56(c) provides:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In W.M. Barnes Co. v. Sohio Natural Resources Company, 627 P.2d 56 (Utah 1981), this court set forth Utah law on summary judgment in the following language:

> "Motions for summary judgment serve the salutary purpose of eliminating the time and expense of a trial when a party is entitled to relief on the law as

applied to undisputed facts. Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960). Because the remedy is preemptory, a court in considering a motion for summary judgment must view the facts and the inferences from those facts in the light most favorable to the party moved against. Rich v. McGovern, Utah, 551 P.2d 1266 (1976); Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966); Strand v. Mayne, 14 Utah 2d 355, 384 P.2d 396 (1963); Welchman v. Wood, 9 Utah 2d 25, 337 P.2d 410 (1959). In all events, `[i]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence,' and `it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.' Holbrook Co. v. Adams, Utah, 542 P.2d 191, 193 (Utah 1975). Plaintiff has met that requirement in this case."

In Bowen v. Riverton City, Utah 656 P.2d 434 (Utah 1982) our Supreme Court said:

"Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *In re Williams' Estates*, 10 Utah 2d 83, 348 P.2d 683 (1960). If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. *Durham v. Margetts*, Utah, 571 P.2d 1332 (1977); *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964)."

Mountain States Etc. v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984):

"Therefore under Rule 56(c), Utah R.Civ.P., summary judgment can be granted only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Doubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to

the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility."

Later cases have been to the same effect. In Rees v. Albertson, Inc., 587 P.2d 130 (Utah 1978) our Supreme Court said:

"In consequence of the facts as contended by the plaintiff and the principles of law applicable thereto as discussed herein, it is our conclusion that the summary judgment was improperly granted and that this case should be remanded for further proceedings."

Grow v. Marwick Development, Inc., Utah, 621 P.2d 1249 (Utah 1980).

"It is a well-settled principle of law that summary judgment can only be granted when there is no dispute as to a material fact. *Russell v. Park City Utah Corp.*, 29 Utah 2d 184, 506 P.2d 1274 (1973); *Controlled Receivables, Inc. v. Harman*, 17 Utah 2d 420, 413 P.2d 807 (1966). The purpose of summary judgment is to save the expense and time of the parties and the court, and if the party being ruled against could not prevail when the facts are looked at most favorably for his position, the summary judgment should be granted. *Holbrook Co. v. Adams,* Utah, 542 P.2d 191 (1975)."

In Hall v. Warren, 632 P.2d 848 (Utah 1981) this court said:

"On this appeal we view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the losing party, *Durham v. Margetts*, Utah, 571 P.2d 1332 (1977); *Thorpson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964)."

The summary judgment in the instant case cannot be sustained. The allegations, if proven, may support a claim in negligence. Moreover, the record reveals disputed issues of material facts."

W.M. Barnes Co. v. Sohio Nat. Res. Co, Utah 627 P.2d 56 (Utah 1981).

"On a motion for summary judgment, it is not appropriate for a court to weigh disputed evidence

concerning such factors, the sole inquiry to be determined is whether there is a material issue of fact to be decided. *Holbrook Co. v. Adams*, 542 P.2d 191 (Utah 1975). In making that determination, a court should not evaluate the credibility of the witness. It is of no moment that the evidence on one side may appear to be strong or even compelling, and documentary evidence is not dispositive if the intent and purpose underlying the documents are at issue.

Chapman v. Chapman, 728 P.2d 122 (Utah 1986).

"Typically, factual disputes are raised by sworn statements. *See Holbrook Co. v. Adams*, 542 P.2d 191 (Utah 1975)."

Staker v. Ainsworth, 785 P.2d 417 (Utah 1990).

"In reviewing the record on any appeal from summary judgment, we treat the statements and evidentiary materials of the appellant as if a jury would receive them as the only credible evidence, and we sustain the judgment only if no issues of fact which could affect the outcome can be discerned."

"[i]f there is any genuine issue as to any material fact, summary judgment should be denied. To successfully oppose a motion for summary judgment, it is not necessary for the party to prove its legal theory. Indeed, it only requires one sworn statement to dispute the claims on the other side of the controversy and create an issue of fact. In resolving the issue, the court does not judge the credibility of the claims or the witnesses or the weight of the evidence."

Draper City v. Estate of Bernardo, 888 P.2d 1097 (Utah 1995).

"In granting summary judgment, it is apparent that the trial court gave more weight to some affidavits than to others. This was inappropriate at this stage of the litigation. On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist. *W.M. Barnes Co. v. Sonic Nat'l Resources Co*, 627 P.2d 56, 59 (Utah 1981)."

"It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to

> resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. *Holbrook Co. v. Adams* 542 P.2d 191, 193 (Utah 1975). We have additionally held that 'it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact.' *Id.*"

Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (Utah App. 1996).

> "The Utah Supreme Court recently pointed out that "[o]n a motion for summary judgment, a trial court should not weigh disputed evidence and its sole inquiry should be whether material issues of fact exist".
>
> "[i]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble[,] and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail".
>
> "*Id.* at 1101 (quoting *Holbrook Co. v. Adams,* 542 P.2d 191, 193 (Utah 1975)). Moreover, "'*it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact'" Id* (quoting *Holbrook*, 542 P.2d at 193) (emphasis added)."
>
> "In the present case, the trial court found facts and weighed evidence presented by the parties, which was inappropriate in considering a motion for summary judgment."

The question is whether or not the record reveals, through pleadings, affidavits and records in the case, a material dispute of fact. Here it does.

THE FACTS

The record reveals that at the time of the hearing on the Motion for Summary Judgment there was before the court an affidavit that swore there was an express oral contract which rejected an "at-will" employment relationship. Record 95, 96.

APPLICATION OF LAW TO FACTS

Only a full-blown hearing at which parties can develop the various theories will show the pertinent and relevant facts that obviously are involved, and Appellant has a right to a jury trial on those issues pursuant to the jury instructions in the Addendum hereto.

10. CONCLUSION AND RELIEF SOUGHT

There are questions of fact as to whether Appellant was an "at will" employee and whether Appellee was entitled to judgment as a matter of law that render the granting of the subject Motion for Summary Judgment invalid and contrary to law. Said judgment should be overruled and the case be remanded to the trial court for trial and disposition.

Respectfully submitted this 8th day of March, 1999.

Robert B. Hansen, Pro Se
838 18th Avenue
Salt Lake City, UT 84103